HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32(2) (b)

Description of the Case.

Criminal Appeal No. 16 of 2001

Smt. Kamla Devi and another … Appellants

Versus

State of Uttaranchal. … Respondent

Approved for reporting.

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Not approved for reporting.

Date of Decision 12th October 2004.

Initial of Judge.

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IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Reserved

Criminal Appeal No. 16 of 2001

1. Smt. Kamla Devi W/o late Girish Ram,
   R/o Siloti Pant, Patti Purvi Chkhata,
   District Nainital.
2. Puran Lal S/o Sohan Lal,
   R/o village Mehragaon, Patti Purvi Chkhata,
   District Nainital. ... Appellants

Versus

State of Uttaranchal. ... Respondent

Sri Arvind Vashishtha, learned counsel for the appellants
Sri Nandan Arya, learned Addl. G.A. for the state

Coram : Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

Appellants Smt. Kamla Devi and Puran Lal have been convicted by the Court of Addl. Sessions Judge/ Special Judge (CBI), Nainital u/s 302/34 IPC and sentenced thereon to life imprisonment vide judgment and order dated 23.03.1999.

Brief facts, giving rise to the prosecution case, are that Girish Ram was the husband of accused/appellant Kamla Devi and another accused Puran Lal is the brother of Kamla Devi. Appellant Puran All, being brother-in-law of deceased Girish Ram, used to visit the house of deceased in order to know about the welfare of his sister Kamla Devi. The appellant Kamla Devi used to quarrel with the deceased off and on and on 30.04.1997 at about 5-6 a.m. the appellant Kamla Devi went to the house of Daulat Ram situate at Siloti Pant, Patti Purva Chhai

Khata, district Nainital and informed him that Girish Ram, her husband had been murdered by some unknown persons in the intervening night of 29/30.04.1997.

Daulat Ram, after having the aforesaid information, immediately rushed to the house of Girish Ram and saw his dead body lying inside the room. Daulat Ram, thereafter scribed the written report pertaining to the incident and handed over the same to the Patwari Patti Purvi Chhai Khata who prepared Chik Report. The Patwari, thereafter went to the place of occurrence on 30.04.1997 and prepared the site plan. The Patwari also recovered the *KULHARI*, the weapon used in the commission of crime and also completed other formalities at the spot. The Patwari, thereafter recorded the statement of Km. Ritu D/o the deceased and in the light of the statement of Km. Ritu, the fact relating to the murder of Girish Ram could be revealed. The Patwari, thereafter proceeded further; recorded the statements of other witnesses and after completion of the investigation; submitted the charge sheet against the accused/appellants before the Court of C.J.M., Nainital.

After the inquest on the dead body of Girish Ram was prepared, the body was sent for the postmortem and Dr. K.L. Arya (PW 3) conducted the postmortem on the body of the deceased Girish Ram on 01.05.1997. The doctor found 11 incised wounds on the different part of the body of the deceased.

After submission of the charge sheet, the accused/ appellants were committed to the Court of Sessions and the Trial Court framed the charge u/s 302/34 IPC against the accused/appellants on 29.09.1997. The

accused/appellants denied of the charge levelled against them and claimed their trial.

The prosecution, in order to bring the guilt of the accused/appellants to home, produced PW 1 Daulat Ram, PW 2 Chandan Ram, PW 3 Dr. K.L. Arya, PW 4 Km. Ritu, PW 5 Ramesh Chandra, PW 6 Tari Ram and PW 7 Rakesh Chandra, (I.O.)

After the evidence of the prosecution was over; the statement of the accused/appellants were recorded u/s 313 Cr.P.C. The appellants produced DW 1 Puran Lal in their defence.

The learned Trial Court, after having perused the evidence on record and hearing learned counsel for the parties, convicted the accused Kamla Devi and Puran Lal u/s 302/34 IPC and sentenced them to life imprisonment vide judgment and order dated 23.03.1999.

Feeling aggrieved by the aforesaid impugned judgment and order, the convicts Kamla Devi and Puran Lal filed appeal before this Court which has been placed before this Bench for disposal according to law.

We have heard learned counsel for the parties and perused the record.

According to the prosecution case Girish Ram was murdered in the night of 29.04.97 and the information with regard to his murder was conveyed to the informant Daulat Ram (P.W. 1) by the accused/appellant Smt. Kamla Devi. It reveals from the First Information Report that Kamla Devi went to the house of Daulat Ram (P.W. 1) in the morning of 30.04.97 and disclosed that her husband was murdered by some unknown assailants in the preceding night.

The First Information Report pertaining to the aforesaid incident was lodged by Daulat Ram (P.W. 1) on 30.04.97 with Patwari Patti Purvi Chhai Khata at 8:30 a.m..

Autopsy on the deceased Girish Ram was conducted on 01.05.1997 at 11:00 AM by Dr. K.L. Arya (P.W. 3) who found following anti-mortem-injuries on his person:-

1. Incised wound, 1.30 cm X 5 cm X bone deep, on the upper part of neck at the level of axillary, tracking and both curotied arteries are cut through extending over the front of neck from left stemomosterid muscle, horizontally placed.
2. Incised wound, 11 cm X 2 cm X muscle deep 2 cm below the injury no.1 in front of neck.
3. Incised wound, 3 cm X 1cm X skin deep on the superasteinal north.
4. Incised wound, 3 cm X 1cm X muscle deep on left chest just lateral to spinal bone upper end.
5. Incised wound, 6 cm X 1/1/2 cm X bone deep, on the left side of face extending from nasal bone to lateral of cheek. Horizontal placed.
6. Incised wound, 4 cm X 2cm X bone deep on the left cheek 4cm below the injury no. 5.
7. Incised wound, 4 cm X 1cm X bone deep on the left side of face, horizontally placed just lateral to injury no. 6.
8. Incised wound, 2cm X 1cm X skin deep 10 cm below the injury no. 6, horizontally placed.
9. Incised wound, 4 cm X 1cm obliquely placed on upper lip towards right cheek.

10. Incised wound, 7cm X 4cm X muscle deep on the anterior medial aspect of right leg 11 cm above the medial end of right tibia, clouted blood present.

11. Incised wound varying in size 4cm X ½ X skin deep on left leg anterior medial aspect of an above the left medial end of tibia.

Considering the aforesaid anti-mortem-injuries, it would be quite clear that injuries were caused by some sharp edged weapon. Dr. K.L. Arya (P.W. 3) has deposed in his evidence before the court that the injuries sustained on the person of the deceased Girish Ram could be caused by the 'axe' in the night of 29.04-97. The doctor has further deposed that these injuries could be caused by a single weapon.

It is thus clear that the injuries on the person of the deceased were caused by axe and that too in the night of 29.04.1997.

It is further clear that the death of the deceased Girish Ram could be caused in the mid night of 29.04.97. In view of the postmortem report, the semi-digested food was found in the small intestine of the deceased. Presence of semi-digested food in the small intestine of the deceased indicates that the deceased was murdered sometime between 12:00 to 1:00 in the night. The doctor has deposed that presence of semi-digested food in the small intestine shows that the deceased might have taken his meal before 4 to 6 hours of his death.

The deposition of the doctor, if considered in the light of the statement of Chandan Ram (PW 2) then it reveals that this witness has deposed in his statement that

he took food with Girish Ram at his house in the night of 29.04.97 at about 8:30 PM. Deposition of Ramesh Chandra (PW 5) shows that he went to the house of his deceased nephew (Bhanja) to sleep in the night of 29.04.97 but on account of the presence of Puran Lal (Appellant) and dearth of accommodation at the house of Girish Ram, he returned and stayed in the house of his sister.

Likewise, Tari Ram (P.W. 6) has also deposed that his brother had gone to the house of Girish Ram but on account of the presence of Puran Lal and dearth of accommodation, he came back to his house. Thereafter, he and his brother Ramesh Chandra (PW 5) slept in the house of his sister.

Thus, the evidence discussed above, clearly indicates that deceased Girish Ram was murdered in the night of 29/30.04.1997 and that too by an axe, in view of the nature of injuries sustained by him. It further reveals that Girish Ram died in the night of 29/30.04.1997 sometime between 12:00 to 1:00 P.M.

It so now to be assessed on the basis of the evidence adduced by the prosecution as to appellants are actually responsible for committing the murder of Girish Ram or not.

In order to reach to a definite conclusion this factor will have to be kept in mind that the appellant Kamla Devi is the wife of the deceased Girish Ram and it is also not disputed that Kamla Devi has been sleeping in the same room along with her husband - Girish Ram deceased. Therefore, the company of the accused/appellant Kamla

Devi with the deceased Girish Ram is not questioned in any way.

The conduct of accused/appellant Kamla Devi appears to be highly doubtful. As we have already observed that the death of Girish Ram could have taken place about 12:00 to 1:00 in the night, but the information with regard to the death of Girish Ram was conveyed by the appellant Kamla Devi to her brother-in-law (Jethu) in the morning at ab0ut 5 to 6A.M. of 30.04.1997. It appears to be quite unreasonable that some unknown assailants assaulted the husband of the accused/appellant Kamla Devi and she did not raise any hue and cry in order to attract the attention of the persons residing at nearby place. Further this lady kept silent for about 3 to 4 hours at least and did not convey the message of the death of her husband to anyone till the morning of 30.04.1997. The injuries sustained by the deceased clearly indicate that he was rather butchered before he died. A number of incised wounds on the person deceased shows that he was in fact murder in a brutal and merciless manner. It is also surprising to note that Girish Ram who was sleeping by the side of the accused/ appellant Kamla Devi sustained a number of incised wounds on his person and his neck was rather chopped off, even then no blood stains were found either on the person of accused/appellant Kamla Devi or on her clothes. Accused/appellant Kamla Devi neither tried to resist with the assailant who caused injuries on the person of her husband nor single abrasion was caused on her person during the course of the occurrence. Therefore, conduct of this accused/appellant Kamla Devi as well as absence of any injury or any blood stains either

on her person or on her clothes clearly points out towards the guilt of the accused/appellants Kamla Devi and none else.

As far as the accused/appellant Puran Lal is concerned there is certainly an evidence of last seen against him. Chandan Ram (P.W.2) has deposed in his statement that he went to the house of Girish Ram in order to take his meal and after taking his meal when he was returning to his house then he saw Puran Lal over there and in the next morning i.e. 30.04.1997, he came to know that Girish Ram was murdered with an axe and when he went to the house of Girish Ram than he did not find Puran Lal over there.

Ramesh Chandra (P.W.5) has deposed that on 29.04.1997, he went to the house of Girish Ram deceased to sleep over there but on account of the presence of Puran Lal brother-in-law of the deceased Girish Ram as well as dearth of accommodation in the house of Girish Ram, he returned back and sleep in the house of his sister.

Tari Ram (P.W.6) has deposed in his evidence that Ramesh Chandra (P.W.5) went to the house of Girish Ram on 29.04.1997 in the night but he came to know over there that Puran Lal brother-in-law of the deceased Girish Ram was already there, therefore, he came back to the house of his sister and this witness as well as Ramesh Chandra (P.W.5) slept in the house of their sister. This witness has further deposed that in the morning of 30.04.1997 when he was going for defalcation then he saw Puran Lal accused/appellant at a short distance from the house of deceased Girish Ram going towards the jungle. This witness in his cross-examination has deposed that the he saw

Puran Lal on 30.04.1997 at about 5:00 a.m. This witness has further deposed that he saw Puran Lal from a distance of about 10-15 furlong.

It is, therefore, quite clear that the accused/appellant was lastly seen in the house of the deceased Girish Ram and in the morning of 30.04.1997, he was again seen going from the house of deceased Girish Ram. Hence, presence of the accused/appellant Puran Lal at the house of the deceased Girish Ram in the night of 29.04.1997 when the murder took place, cannot be ruled out.

It is thus dear that the accused/appellant being wife of the deceased Girish Ram was sleeping in the same room along with her husband as well as the another accused Puran Lal who is the brother-in-law of the deceased Girish Ram was also present in the house of Girish Ram in the night when the murder of Girish Ram took place.

This is the strong circumstance against both the accused/appellant, which clearly points out towards their guilt.

A part of the conduct of the accused/appellant Kamla Devi as has been discussed by us above as well as last seen of the accused/appellant Puran Lal in the company of the deceased in his house, another important evidence in the present case against the accused/appellants is that of Kumari Ritu (P.W.4). This witness is the daughter of the deceased Girish Ram as well as accused/appellant Kamla Devi. This witness when produced before the court, has clearly deposed that her father was murdered by her mother Kamla Devi and

maternal uncle Puran Lal. She has also deposed that she was sleeping with her parents i.e. deceased Girish Ram, accused/appellant Kamla Devi and saw that her mother and maternal uncle murdered her father with an axe. She has further specifically assigned the role to both the accused/appellants by deposing that her maternal uncle was having an axe in his hand and he assaulted on the neck of her father Girish Ram. This witness in her cross examination has stated that she had not been tutored by anyone with regard to the fact of the occurrence. She has also stated that before the murder of her father there was a quarrel between her father, mother and maternal uncle. This witness has further deposed that when her father was murdered there was none else present in the house except her father deceased Girish Ram, her mother accused/appellant Kamla Devi and her maternal uncle Puran Lal as well as herself. This witness has also deposed that when her father was murdered by her maternal uncle Puran Lal with an axe then her mother caught hold of her father.

Learned counsel for the appellant has put vehement stress on this aspect of the matter that no credence could be attached on the evidence of a child witness. He has pointed out some portion from the deposition of this witness, in order to submit that the deposition clearly indicates that the child witness is tutored one.

We fail to appreciate the arguments advanced by the learned counsel for the appellant.

The **Hon'ble Apex Court in the decision cited in 2000 Supreme Court Cases (Criminal page 1236 Shishan Vs. State of Rajasthan** has observed the "the

court before recording the evidence of the child witness should take precaution of examining and finding out the child witness capacity to depose and in case, if the court come to the conclusion that his deposition indicates that he had sufficient maturity to depose what he saw, under these circumstances the conviction could be based on the testimony of this child witness."

Again the **Hon'ble Apex Court in another decision reported in 2003 Supreme Court Cases (Criminal) page 561 State of Karnataka Vs. Shariff** has observed that *"in case, if the child was sleeping at night near his mother then his presence in the house at the time of the occurrence was certainly natural and as such on the facts his presence could not be held to be doubtful."*

In the instant case the child witness Kumari Ritu (PW4) was sleeping with her mother in the night as well as at the time of the occurrence. Therefore, her presence at the time of the occurrence cannot be said to be doubtful in any manner. We do not find any reason as to why Kumari Ritu would give a false statement against her own mother.

The deposition of Kumari Ritu (P.W.4) shows that the learned trial judge before recording her statement has categorically put certain question to her and thereafter learned trial judge reached to the conclusion that the child witness was certainly able to understand the questions put to her. The trial judge was satisfied that Kumari Ritu (P.W.4) had sufficient maturity to depose what she saw. The trial judge was also satisfied with regard to the capacity of the child witness to depose. In the cross

examination of Kumari Ritu (P.W.4) nothing could be brought to have any doubt on her capacity to depose. Therefore, to our mind the conviction based on the testimony of this witness by the trial Judge cannot be said to be unwarranted. The testimony of the witness Kumari Ritu (P.W.4) appears to be fairly reliable on the factum of the incident and the same cannot be discarded only on account of some stray sentences in her cross-examination. Kumari Ritu (P.W.4) has clearly deposed in her statement before the court that in what manner her father was murdered by the accused/appellants.

We do not find any reason to disbelieve the testimony of Kumari Ritu (P.W.4).

In the instant case apart of the sole testimony of the child witness the other factors also established the guilt of the accused/appellant beyond reasonable doubt i.e. the presence of Kamla Devi in the night of the occurrence in the same house along with her deceased husband and silence observed by Kamla Devi for at least 2-3 hours after the murder of her husband and raising no hue and cry at the time of the occurrence. Further no injury on the person of the accused/appellant Kamla Devi as well as no blood stains on her person or on her cloth. Another strong circumstance is the last seen of the accused/appellant Puran Lal in the house of the deceased Girish Ram in the night of 29.04.1997 when his murder took place.

The sole testimony of the child witness thus is corroborated by the other circumstances in the case.

Apart of the aforesaid circumstances discussed by us the brutality of the crime also cannot be ignored. The

deceased Girish Ram was murdered in a brutal manner and during the course of the occurrence, as we have already observed that neither the accused/appellant raised any hue and cry nor tried to put any resistance. It is not a case where the unknown assailant entered inside the house of Girish Ram and by giving a single blow on his person committed the murder. Presence of 11 incised wounds on the person of the deceased Girish Ram itself tells its story. Therefore, the credibility of the child witness cannot be discarded, in view of the other corroborating circumstances.

Learned counsel for the prosecution has further argued that in view of the provision of 106 of the Evidence Act, the burden lies on the shoulder of the accused/appellants to disclose this fact that actually in what manner the murder took place. It has been submitted that it was the accused/appellants who were present in the night when the murder of Girish Ram took place. Therefore, the accused/appellants are the best persons to disclose the factum of the manner of the incident.

We fail to appreciate the argument advanced by the learned counsel for the State. In the instant case the provision of Section 106 of the Evidence Act does not apply as it applies only when a fact is in the special knowledge of any person. In the instant case, the prosecution has come with a version that the deceased was murdered by the accused/appellants with an axe. Therefore, it was the burden of the prosecution to establish the manner of incident beyond reasonable doubt.

In the instant case, we come to the conclusion that the prosecution has established the guilt of the accused/appellant beyond reasonable doubt by adducing the direct evidence. Evidence related to other circumstances adduced by the prosecution in the instant case clearly points out towards the guilt of the appellant and none else in the gruesome murder of the deceased Girish Ram.

We are thus of the opinion that the conviction of the accused/appellants under Section 302/34 I.P.C. and sentencing them thereon recorded by the trial court suffers with no infirmity. The impugned judgment and order passed on the part of the court below is liable to be confirmed.

The appeal is accordingly dismissed. The conviction and the sentence awarded thereon against the appellant by the trial court vide impugned judgment and order dated 23.03.1999 is hereby confirmed.

The record of the court below be returned back immediately for necessary compliance alongwith copy of the order.

(B.C. Kandpal, J) **(M.M. Ghildiyal, J)**

October 12, 2004
S.J.